BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL P. HOGAN Claimant	)	
VS.	)	
GLOBAL ENG. & TECHNOLOGY Respondent	)	Docket No. **1,039,228**
AND	)	
STANDARD FIRE INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requests review of the June 9, 2008 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Daniel P. Hogan alleged he suffered repetitive injury to his right upper extremity on or about September 17, 2007, and each and every day worked thereafter during his employment with respondent.[1] The Administrative Law Judge (ALJ) found Hogan failed to sustain his burden of proof that he provided timely notice of the accident within 10 days. The ALJ further found Hogan did not establish just cause in order to extend the time for providing notice of his accident to 75 days after the date of accident.[2]

Hogan requests review of whether the ALJ erred in finding he did not sustain his burden of proving notice with the statutory time frame.

Respondent argues the ALJ's Order should be affirmed.

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[1] E-1 Application for Hearing filed March 13, 2008.

[2] See K.S.A. 44-520

The sole issue raised on this appeal from the preliminary hearing Order is whether Hogan provided timely notice of his accidental injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Daniel Hogan began working for respondent in December 1999. His job was to build cabinets designed for airplanes. He was required to use die grinders, sanders, air tools and numerous hand tools as well. He would cut the wood for the cabinet, sand it, paint it and put it together. Hogan testified he started to have severe pain and numbness in his left hand and fingers in August 2007. He further testified that the repetitive work using the vibratory tools caused the problems with his hands.

On August 8, 2007, Hogan sought treatment on his own and was seen by Dr. Scott Goin and Megan Hackney, Dr. Goin's physician assistant. Hogan provided a history of left wrist pain and hand numbness for the past eight or nine months. He did not recall any specific injury. The doctor suspected Hogan had carpal tunnel syndrome and an EMG was scheduled. The EMG revealed Hogan had moderate median nerve entrapment of the left hand and mild median nerve entrapment of the right hand. Left carpal tunnel release surgery was then scheduled.

Hogan then had a conversation with his supervisor, Michael Luker, and told him that he had scheduled surgery for carpal tunnel syndrome in his left hand. Hogan had to arrange time off from work. Hogan testified that during that conversation he asked Luker if he thought his condition was work related. Hogan testified that Luker did not respond and he did not press the issue. Hogan stated that he did not say anything else because he was fearful for his job as other employees had been let go with his type of problem. The conversation occurred in the shop office and it was loud but Hogan thought Luker heard him. Hogan testified:

> Q. And then on line 7, it says: "Do you remember when that was approximately?" You said that it was prior to surgery. Then it says, "When you told Mr. Luker about your pain, did you tell him about whether it was work related?" And you said: "I asked him." So you asked him if it was work related?
>
> A. Yeah, I asked him that. Yes, I asked him.
>
> Q. So you never said, "I think this is work related," you said, "Do you think this is work related?" Is that correct?
>
> A. I asked him, yes, I recall asking him.
>
> Q. What was his response to that?

A. There was none, really.

Q. He didn't say anything at all in response to you?

A. No, really didn't.

Q. Where were you whenever you told him that?

A. Shop office.

Q. Was it loud where you were?

A. Yes.

Q. Is it possible that he didn't hear you when you told him about - - that you asked if it was work related?

A. I have a pretty loud voice, I'm pretty sure he heard me.

Q. And you didn't press the issue or ask anything else after he didn't respond to you?

A. No.

Q. Why didn't you say anything else to him?

A. I was in fear of my job because people have been let go in the past with this type of problem.[3]

Hogan further testified that other than the conversation with Luker he never asked anyone else at respondent about getting workers compensation benefits. Hogan testified:

Q. At any time either before your or after your surgery did you ask anybody at Global Engineering about the possibility of getting work comp benefits?

A. Yes, I did, Mr. Luker.

Q. So you asked him if you were eligible to get benefits for your injury?

A. Not straight out. Like I said, I was in fear for my job. I asked if he thought that maybe it was work related and his response was -- actually, I don't recall his exact response. But I didn't press the issue, no.

Q. Did Mr. Luker ever ask you if your injury was work related?

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[3] P.H. Trans. at 15-16.

A. No.

Q. Did he ever ask anything about whether or not you wanted to file a workers' compensation claim?

A. No, he did not.[4]

Hogan had left carpal tunnel release surgery on September 11, 2007. Dr. Goins performed the surgery. The medical bills were submitted to Hogan's personal health insurance carrier. He was off work for three weeks and then returned to his same job without restrictions. Hogan continued working for respondent until December 17, 2007. When Hogan returned to work after his surgery he stated that his pain had reduced and by the time of the preliminary hearing he did not have any pain.

At the preliminary hearing Hogan was simply seeking payment of outstanding medical bills for his surgery as well as temporary total disability compensation for the three weeks he was off work following the left carpal tunnel release surgery. Hogan did not request any additional medical treatment.

As previously noted, the E-1 alleged repetitive injury to the right upper extremity from September 17, 2007 and each day worked thereafter. But all the testimony elicited at the preliminary hearing was limited to Hogan's left wrist and hand. Accordingly, the reference to the right upper extremity on the application for hearing must have been a typographical error.

Hogan's testimony was uncontradicted that he asked Luker, his supervisor, whether he thought his diagnosed carpal tunnel syndrome was work-related. And that he was confident Luker heard the question but simply did not respond. This Board Member finds that the question was sufficient to place respondent on notice that Hogan considered his injury potentially work-related and should have led to further inquiry and a response to his question. Consequently, this Board Member would find that conversation sufficient to establish Hogan provided timely notice.

Moreover, Hogan alleged he suffered a series of repetitive traumas starting September 17, 2007 and each and every day thereafter. K.S.A. 2007 Supp. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being defined by statute. The new date of accident determination is as follows:

> 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated

[4] P.H. Trans. at 21-22.

> herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[5] (Emphasis added.)

K.S.A. 2007 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury's date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is "diagnosed as work related." Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

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[5] K.S.A. 2007 Supp. 44-508(d).

In the instant case, Hogan was never restricted nor taken off work by an authorized physician as he had sought medical treatment from his own physician. Absent those facts, the next possible accident date is the earliest of either the date of Hogan's receipt in writing of notification that his condition was diagnosed as work related or the date he gave written notice of the injury to the respondent. There is no evidence Hogan received written notification that his condition was diagnosed as work related. Consequently, under the plain language of the statute, Hogan's date of accident would be when he made written claim to respondent for the series of microtraumas occurring through his last day worked. And, based upon the administrative file in this instance, the date would be March 12, 2008, when respondent was served with a Notice of Intent to file a preliminary hearing. Accordingly, notice would be timely.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 9, 2008, is reversed and this matter remanded to the ALJ for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of August 2008.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[6] K.S.A. 44-534a.

[7] K.S.A. 2007 Supp. 44-555c(k).